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IN THE

Supreme Court of the United States

October Term, 1940.

No. 274

HERBERT H. MAASS, as Sole Surviving Executor of the Last Will and Testament of Ida H. Saks, Deceased,

Petitioner,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILBUR C. DAVIDSON,
Counsel for Petitioner.

HERBERT H. MAASS,
DAVID J. LEVY,
Of Counsel.

July, 1940.

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INDEX.

	PAGE
Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof:	1
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes and Regulations Involved	2
Statement	3
Specifications of Errors To be Urged	3
Reasons for Granting the Writ	4
Conclusion	8
Brief in Support of the Petition:	9
Argument	9
Conclusion	16
Appendix A	17
Statutes and Regulations Involved	17
Statute	17
Regulation	18
Appendix. B	22

TABLE OF CASES CITED:

Bull v. *United States*, 295 U. S. 247 ..... 11, 16

Clark v. *United States* (D. C. for Dist. of Md.), 33 F. Supp. 216 ..... 5, 6, 7, 9, 10, 13, 14, 15

Eisner v. *Macomber*, 252 U. S. 189, 207 13

Estate of Cordelia Y. Abendroth v. *Commissioner* and *Estate of Kate Read Blacque* v. *Commissioner*, 41 B. T. A. No. 156 ..... 5, 6, 11

Estate of Gertrude Eaton v. *Commissioner*, decided May 20, 1940 ..... 5, 6

Estate of Catherina Loffler v. *Commissioner*, decided June 15, 1940 5

Estate of Harriet I. J. Singer v. *Commissioner*, decided June 5, 1940 5

Estate of Benjamin M. Spurr v. *Commissioner*, decided May 18, 1940 ..... 5, 6

PAGE

Koshland v. *Helvering*, 298 U. S. 441, 447 15

Lynch v. *Hornby*, 247 U. S. 339 13

Manhattan General Equipment Co. v. *Commissioner*, 297 U. S. 129, 134 15

Nichols v. *United States*, 64 Ct. Cls. 241, 246, cert. den. 277 U. S. 584 16

United States v. *Phellis*, 257 U. S. 156, 159 13

United States v. *Safety Car Heating Co.*, 297 U. S. 88. 13

United States v. *Supple-Biddle Hardware Co.*, 265 U. S. 189, 196 16

OTHER AUTHORITIES CITED:

18 Chicago-Kent Law Rev., March 1940, pages 152-163 16

Committee of Conference on the Revenue Bill of 1935 (74th Congress, 1st Sess.. H. R. No. 1885, pp. 10-11) 15, 22

74th Congress, 1st Sess. S. R. 1240, pp. 9-10 15

Hughes, Federal Death Taxes (1938 Ed.), page 310.. 16

Judicial Code, as amended by the Act of February 13, 1925:

Section 240 (a) 2

Montgomery, Federal Taxes on Estates, Trusts and Gifts (1938-39 Ed.), page 230 16

Pennsylvania Bar Association Quarterly No. 34, pages 100, 105 16

Regulations 80, Article 11, of the Treasury Department 2, 3, 4, 18

Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935:

Section 302 (j) 2, 3, 4, 17

Revenue Act of 1926, as amended by Section 404 of the Revenue Act of 1934:

Section 302 and 302 (a) 17

"Taxes", March 1939, pages 145-6 16

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No.

HERBERT H. MAASS, as Sole Surviving Executor of the Last Will and Testament of Ida H. Saks, Deceased,

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—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,

Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof.

Petitioner respectfully prays that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the Second Circuit affirming, by a divided court, a judgment of the District Court for the Southern District of New York in favor of the defendant in an action to recover a refund of Federal estate taxes.

Opinions Below.

The case was known below *sub. nom. Saks* v. *Higgins,* the change in title here occurring because of the death of one of the plaintiffs-executors.

The opinion of the District Court (R. 17-24) is reported in 29 F. Supp. 996. The opinions of the Circuit Court of Appeals (R. 31-38) are reported in 111 F. (2d) 78. The majority opinion was written by Judge Learned Hand and the dissenting opinion by Judge Chase.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 24, 1940 (R. 39). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

When an estate exercises the option provided in Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935, to have the value of the gross estate determined, for Federal estate tax purposes, as of the date one year after the decedent's death, or other "optional valuation date" (instead of as of the date of death), must there be included therein, in addition to the principal assets of the estate, the income earned upon such principal assets after the date of death and up to such optional valuation date, as directed by Regulations 80, Article 11, of the Treasury Department, or is such regulation an invalid extension of the statute?

Statutes and Regulations Involved.

The pertinent statutes and regulations involved are set forth in Appendix A, *infra,* pages 17-21.

Statement.

Inasmuch as only an issue of law was involved, the case was heard below on the cross-motions of the respective parties for judgment on the pleadings.

Ida H. Saks died on August 30, 1936. Her executors duly filed the Federal estate tax return, and elected to have the estate valued at the "optional valuation date", rather than as of the date of death, as allowed by Section 202 (a) of the Revenue Act of 1935.

Pursuant to the provisions of Article 11, Regulations 80, the Commissioner of Internal Revenue included in the taxable estate not only the capital value as of the proper valuation date of all of the capital assets comprising the estate of the decedent at the date of her death, but also the sum of $19,956.32, representing income which was not any part of the property of the decedent at the time of her death, but on the contrary consisted of interest, dividends and rents earned by and upon the property and assets of the estate between the date of the decedent's death and the optional valuation date (Complaint, Par. 6, R. 5, as amended by Stipulation, R. 12, and not denied by Answer, R. 13-14). The Federal estate tax which was thereafter assessed upon this basis was duly paid, and claim for refund was filed and rejected, resulting in this suit to recover the excess tax of $3,952.45.

The District Court decided in favor of the respondent, and the Circuit Court of Appeals affirmed by a divided court.

Specifications of Errors To Be Urged.

The Court below erred—

(1) In holding that the income earned by the

estate subsequent to death should be included in the gross taxable estate under Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935, and that Article 11 of Regulations 80 was in that regard valid.

(2) In determining that the claim for refund herein was properly rejected, and accordingly dismissing the complaint.

Reasons for Granting the Writ.

1. This case presents for the first time in this Court an important question of Federal estate taxation which should be settled by this Court. The statute in question gives the executor of a decedent's estate the right at his election to value assets owned by the decedent at the time of his death as of the date one year after death, or other applicable date in the case of assets disposed of during the one-year period. The statute in terms does not require that income accruing between those dates be included in the gross estate, but the regulation so provides, and this case challenges the validity of that regulation. The question of the correctness of the regulation is one of wide public interest and importance, and is likely to arise in the case of every decedent's estate of sufficient size to require the filing of a Federal estate tax return, where assets decline in value during the period of one year after death.

The petitioner, for the purpose of showing in this petition the importance of the question here involved in terms of its effect on other cases, has endeavored without success to obtain from official sources a statement showing the approximate number of estates pending in the Bureau of Internal Revenue, the Board of Tax Appeals, and the Courts in which this question is presented, and an approximation of the amount of

taxes involved up to the present time. In view of the inability to obtain such official figures or approximations, petitioner begs leave to suggest to this Court the wide interest in this case by pointing out that counsel herein have received inquiries from more than one hundred different lawyers, with offices located in nineteen States of the Union* (at least one state being in each of the ten judicial circuits), and the District of Columbia, all of whom have stated that they represent at least one, and in many instances several, estates in which this question is involved, and have indicated that they will look for a definitive decision from this Court, if possible in this case.

In addition to the present case, this question has been passed upon in the following reported cases: *Clark* v. *United States* (D. C. for Dist. of Md.), 33 F. Supp. 216; *Estate of Cordelia Y. Abendroth* v. *Commissioner* and *Estate of Kate Read Blacque* v. *Commissioner,* 41 B. T. A. No. 156; and in the following cases decided by the Board of Tax Appeals in memorandum opinions and not reported officially: *Estate of Benjamin M. Spurr* v. *Commissioner,* decided May 18, 1940; *Estate of Gertrude Eaton* v. *Commissioner,* decided May 20, 1940; *Estate of Harriet I. J. Singer* v. *Commissioner,* decided June 5, 1940; and *Estate of Catherina Loffler* v. *Commissioner,* decided June 15, 1940 (which cases are reported in Commerce Clearing House B. T. A. Service as Decisions numbered, respectively, 11,110-C, 11,110-H, 11,217-A, and 11,230-A).

Petitions were filed on July 5, 1940, for review by the Circuit Court of Appeals for the Second Circuit of the decisions in the *Abendroth* and *Blacque*

* California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, West Virginia and Wisconsin.

cases, and the petitioner has been informed by counsel that petitions will be filed for review by the Circuit Court of Appeals for the First Circuit of the decision in the *Eaton* case, and by the Circuit Court of Appeals for the Fourth Circuit of the decision in the *Spurr* case. The time for an appeal to the Circuit Court of Appeals for the Fourth Circuit in the *Clark* case, in which the Government lost, has not yet expired, and the petitioner is informed by counsel for the taxpayer in that case that an appeal has been recommended by the Chief Counsel for the Bureau of Internal Revenue and is now under consideration in the office of the Solicitor General.

The large number of cases to which reference is made above have arisen in a period of only four years during which estate tax returns presenting this question have been filed. It is quite likely that the number of such cases will increase rapidly each year. It seems apparent that with the large number of such cases which have arisen and will continue to arise in all parts of the United States, this question eventually will be decided by this Court, and that extended litigation will be avoided if a writ of certiorari be granted in the instant case.

2. The decided cases referred to above present considerable conflict of opinion as to whether the regulations are or are not warranted by the statute. In the present case the majority of the Circuit Court of Appeals upheld the regulations, while Judge Chase, in a dissenting opinion, took the position that the statute did not require the inclusion of income earned after the date of death. In the *Abendroth* and *Blacque* cases, which arose from the State of New York, the majority of the Board of Tax Appeals, without setting forth their independent views on the question, merely took the position that the decision of the Circuit Court of Appeals in the

present case should be followed, while four members of the Board, in a dissenting opinion, expressed their views that the regulations were so clearly unwarranted by the statute that the decision below should not be followed even in a case arising in the Second Circuit. In the case of *Clark* v. *United States,* Judge Chesnut, in a fully considered opinion, and with the opinions of the Circuit Court of Appeals in this case before him, dealt with all phases of the question, in effect refused to follow the Second Circuit Court of Appeals majority, and held that the regulations were invalid and did not require the inclusion of such income.

This uncertainty has left estate representatives impaled upon the horns of a dilemma. The "optional valuation" amendment requires that the election as to basis of valuation shall be made in the return. This election is final and irrevocable. Therefore the estate representative should know when making his return which basis of valuation will result in the lower tax for the estate. In the present unsettled state of the law as to whether the income must be included, the estate representative cannot make an intelligent decision. The amount of the estate on the optional basis *exclusive* of income may be less than at the date of death, but inclusive of income it may be more. Whether the income must be included or not is unknown. The estate must, therefore, chart a course in the dark and may be wrong whichever fork in the road it may take. In order, therefore, that estates may not in large measure be deprived of the benefit and relief which Congress intended to afford by the optional valuation amendment, it is of vital importance that the question at issue be settled *immediately* rather than after the usual conflict between circuits may develop, particularly since the question will in all likelihood eventually be passed upon by this Court in any event.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILBUR C. DAVIDSON,
Counsel for Petitioner.

HERBERT H. MAASS,
DAVID J. LEVY,
Of Counsel.

July, 1940.

BRIEF IN SUPPORT OF THE PETITION.

Argument.

The statute in unambiguous language provides that where the election to use the optional valuation dates is exercised the value of the gross estate shall be determined "by valuing all the property included therein on the date of the decedent's death" as of the optional valuation dates. Therefore, unless the income earned by the assets of the estate during the intervening period is part of the property owned on the date of death, it cannot be included.

The regulations recognize this and for that reason evolve the theory that all "property" is an aggregation of "rights", and that such "rights" exist on the date of death as appurtenances to the capital assets. Thus, it is said that in the case of bonds the "right" to interest is a property right in existence on the date of death; similarly, in the case of stocks the "right" to dividends is an asset in existence on the date of death appurtenant to the corporate stock, and that the same theory applies generally to all capital assets. The regulation then says that when such interest or dividends are collected during the optional year the "right" is to that extent disposed of and the amount received represents the value of the "right" which must be included.

However, as was well stated in the opinion in *Clark* v. *United States* (33 F. Supp. at p. 219), the statute does not make any change in the concept of gross estate which has always existed, and does not make any change in the "property" which is to be included in the gross estate. A bond has never before been treated for estate tax purposes as being anything but an indivisible unit, embodying a promise to pay principal at maturity and to pay

interest for the use of the principal sum until maturity. Interest accrues from day to day, and there is not even a right to receive such interest until it has accrued. Similarly there is no right to receive dividends on corporate stock until they have been declared, and there is no right to receive rents of real property until they have accrued.

As Judge Chase in his dissenting opinion below said:

> "'Any earned income from intangibles is generally treated as nothing but an expectancy which is merely an incident of ownership of the intangibles themselves.'"

Even the majority opinion below recognizes the difficulty of applying the theory of the regulation to such things as crops grown after death upon land owned by the decedent, and the progeny born after the decedent's death of live stock owned by him, since it can hardly be said that such crops or progeny were part of the estate at death. The same difficulty is apparent as to the rents collected after death upon real property which is vacant and non-income producing at the date of death.

That the items of income in question are subject to income tax is not open to dispute, but the position of the regulations is that the same items which are subject to income tax to the estate as income *earned* on the assets *after* the date of death, are subject also to estate tax as being *property* owned by the decedent on the *date of death*. It is submitted that the two theories are conflicting and cannot be reconciled.

As was said in the *Clark* case (33 F. Supp. at p. 221):

> "Income from the property thereafter arising does not belong to the decedent at his death, and

> the right to the possession and enjoyment thereof which came into being after his death belong not to the decedent but to his successors in ownership. To impose the tax on subsequently accruing income is to put it on property belonging not to the decedent but to his successors. It seems a pure abstraction not based on economic realities to say that income received by beneficiaries of the decedent after his death was a part of his gross estate at the time of his death."

Likewise, as was stated in the dissenting opinion of four members of the Board of Tax Appeals in the *Abendroth* and *Blacque* cases:

> "Interest earned after decedent's death and ordinary dividends declared and paid after decedent's death are not items of property on hand at decedent's death. They are not items which represent mere increase in value. They are items of property which have been acquired by the estate since decedent's death and are not taxable to the estate."

The fundamental distinction between an item of principal, which is subject to estate tax, and an item of income earned after death, which is subject only to income tax, was recognized by this Court in *Bull* v. *United States*, 295 U. S. 247. In that case the estate of a deceased member of a partnership deriving its income solely from personal services and in which no capital was invested was entitled for a period of one year after decedent's death to "receive the same interests, or participate in the losses to the same extent" as the deceased partner would if living. The question presented was whether the amount which the estate received as its share of the partnership income during the one-year period was subject to

estate tax as well as income tax. The court held that such amount was not subject to estate tax but was subject to income tax alone. In discussing the Government's argument that the amount in question was subject to estate tax, the court said that the contention was that the Government was entitled to both estate tax and income tax by reason of the *right* conferred on the estate by the partnership agreement and the *fruits* of it. In rejecting that contention, the Court said, at pages 255-256:

> "We are told that since the right to profits is distinct from the profits actually collected we cannot now say more than that perhaps the Commissioner put too high a value on the contract right when he valued it as equal to the amount of profits received—$212,718.99. This error, if error it was, the Government says is now beyond correction.
>
> "While, as we have said, the same sum may in different aspects be used for the computation of both an income and an estate tax, this fact will not here serve to justify the Commissioner's rulings. They were inconsistent. The identical money—not a right to receive the amount, on the one hand, and actual receipt resulting from that right on the other—was the basis of two assessments. The double taxation involved in this inconsistent treatment of that sum of money is made clear by the lower court's finding we have quoted."

Thus, the error of the Government in that case, as in this, was in confusing any rights which may have been embodied in the principal asset as of the date of death with the fruits of such rights which were derived as income after the date of death. The regulations here in question ignore the nature of income as something arising or flowing out of principal, and

not a growth or increment in value of principal. *Eisner* v. *Macomber*, 252 U. S. 189, 207; *United States* v. *Phellis*, 257 U. S. 156, 159; *Clark* v. *United States*, *supra* (33 F. Supp. at p. 221).

The distinction between income from capital and the mere expectancy of future income inherent in the capital itself, which distinction the regulations ignore here, was recognized by this Court in *United States* v. *Safety Car Heating Co.*, 297 U. S. 88. It was there held that a conditional, contingent claim for patent infringement held by a patentee on March 1, 1913, was not a capital asset on that date; that in addition to the patent he had "an expectancy of income, or income, more accurately, in the process of becoming"; that the income subsequently derived from the patent was "the fruit" that was "born of capital"; that such fruit was different from "the potency of fruition" which the taxpayer had on March 1, 1913, and that therefore the amount of the claim collected after March 1, 1913, was taxable income in the year of receipt, and not merely the realization of an asset owned on March 1, 1913.

The present case does not involve liquidating or other capital distributions which might deplete the value of the asset owned on the date of death, but involves only interest, dividends and rents earned by and upon the property and assets of the estate subsequent to the date of death. While a liquidating dividend or capital distribution might deplete the capital asset, that is not true of an ordinary dividend earned on stock. *Lynch* v. *Hornby*, 247 U. S. 339. We know of no ground for saying that rent paid for the use of real property or interest paid for the use of borrowed money is part of the property or money itself.

We might mention further another factor that makes the regulation subject to grave question, *i. e.*, that if the regulation is proper the gross income may

be included without regard to operating costs producing it. So, if real estate exists in an estate, and it yields rent, the taxes, interest and other carrying charges cannot even be deducted in determining the amount of income to be subjected to tax, this for the reason that there is no authority, either in the statute or in the regulation for deducting such items. The same holds true of other forms of income. It would seem that if Congress had intended that the income should be subjected to estate tax, it would have made provision for the deduction of the cost of production, and would not have discriminated as between income on the one hand in the form of interest and dividends, which of its very nature is immediately upon receipt *net* income to the estate, and on the other such forms of income as rents or crops, which are usually only *gross* income, and only become net income after deduction of operating charges. These matters only serve to illustrate further what seems to us the palpable impropriety of the regulation.

It is submitted that the reasoning of the majority opinion below relates chiefly to the validity of a statute which might require, as a condition precedent to the exercise of the option, that the income be included, and that it does not consider adequately the question at issue of whether the statute does so require. As judge Chase said in his dissenting opinion (111 F. (2d) at pp. 80-81) if Congress had intended any such result it would have been a simple matter so to provide in plain words in the statute, and since the statute does not so provide there is no reason for indulging in abstractions in order to disregard the ordinary distinction recognized throughout the income and estate tax statutes between what is usually regarded as principal and as income. See the language of Judge Chesnut to the same effect in *Clark* v. *United States* (33 F. Supp. at pp. 221-222). Since the statute does not provide for including such income, it may not be ex-

tended by the regulations. *Manhattan General Equipment Co.* v. *Commissioner,* 297 U. S. 129, 134; *Koshland* v. *Heivering,* 298 U. S. 441, 447.

If the statute is clear and unambiguous in failing to require the inclusion of income, as its language appears to indicate, there is no need for interpretation. If the language is ambiguous and there is doubt as to its meaning, the intention of Congress in enacting the statute becomes important.

The intention of Congress as indicated by the committee reports was not referred to in the opinions below but was discussed in the opinion in *Clark* v. *United States, supra* (33 F. Supp. at pp. 222-223).

The committee reports show that the statute in question was remedial in purpose and was designed to relieve estates of the hardships caused by the declining values which in many cases made it impossible for the estate to realize enough on the assets to pay the estate tax. The period of one year after death was selected as the normal period of administration during which the executor could make an orderly liquidation of the assets and provide for the payment of charges against the estate, including taxes (74th Congress, 1st Sess. S. R. 1240, pp. 9-10).

The applicable provisions of the report of the Committee of Conference on the Revenue Bill of 1935 (74th Congress, 1st Sess. H. R. No. 1885, pp. 10-11) are set forth in Appendix B hereof, *infra,* pages 22-23.

There is nothing in the committee reports to indicate that Congress intended to make it a condition to the exercise of the election that there be included, in addition to the assets owned on the date of death, the income thereafter arising. On the contrary, the illustration set forth in the committee reports of the operation of the statute shows that there was no such intention. Thus, although the illustration refers to income-producing assets consisting of real estate,

corporate stock and bonds, the figures showing the value of such assets on the optional valuation dates do not include any income accruing after the date of death. It is submitted that the committee reports show that Congress did not intend that such income be included.

Text writers and commentators have uniformly expressed the opinion that the regulation in question is invalid because inconsistent with the statute itself. Montgomery, Federal Taxes on Estates, Trusts and Gifts (1938-39 Ed.), page 230; Hughes, Federal Death Taxes (1938 Ed.), page 310; Pennsylvania Bar Association Quarterly No. 34, pages 100, 105; "Taxes", March 1939, pages 145-6; 18 Chicago-Kent Law Rev. March 1940, pages 152-163.

Furthermore, in interpreting the statute it should be construed in such manner as to avoid the imposition of an estate tax in addition to an income tax on the same income. *United States* v. *Supple-Biddle Hardware Co.*, 265 U. S. 189, 196; *Bull* v. *United States*, 295 U. S. 247, 255-6; *Nichols* v. *United States*, 64 Ct. Cls. 241, 246, cert. den. 277 U. S. 584.

CONCLUSION.

In order to resolve the grave doubt as to the correctness of the decision below, to forestall wide and protracted litigation and to insure to estates the opportunity to exercise intelligently the option granted by Congress, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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HERBERT H. MAASS,
DAVID J. LEVY,
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July, 1940.

APPENDIX A.

Statutes and Regulations Involved.

Statute.

Sections 302 and 302(a) of the Revenue Act of 1926, as amended by Section 404 of the Revenue Act of 1934:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> (a) To the extent of the interest therein of the decedent at the time of his death."

Section 302(j) of the Revenue Act of 1926, as added by Section 202 of the Revenue Act of 1935:

> "If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death, and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subdivision (c), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year

after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. No deduction under this title of any item shall be allowed if allowance for such item is in effect given by the valuation under this subdivision. Wherever in any other subdivision or section of this title or in Title II of the Revenue Act of 1932, reference is made to the value of property at the time of the decedent's death, such reference shall be deemed to refer to the value of such property used in determining the value of the gross estate. In case of an election made by the executor under this subdivision, then for the purposes of the deduction under section 303(a)(3) or section 303(b)(3), any bequest, legacy, devise, or transfer enumerated therein shall be valued as of the date of decedent's death with adjustment for any difference in value (not due to mere lapse of time or the occurrence or non-occurrence of a contingency) of the property as of the date one year after the decedent's death (substituting the date of sale or exchange in the case of property sold or exchanged during such one-year period)."

Regulation.

Article 11, Regulations 80 (in part):

"Art. 11.—Optional Valuation Date.—In general, the object of subdivision (j) of section 302 is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross

estate has suffered a shrinkage in its aggregate value.

"If the decedent died after August 30, 1935, the executor may, by an election upon his return, Form 706, if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:

"(1) Any property distributed, sold, exchanged, or otherwise disposed of within one year after the decedent's death, valued as of the date of such distribution, sale, exchange, or other disposition, whichever first occurs;

"(2) Any property not distributed, sold, exchanged, or otherwise disposed of within such one-year period, valued as of the date one year after the date of decedent's death;

"(3) Any property, interest, or estate which is affected by mere lapse of time, valued as of the date of decedent's death; except that an adjustment is to be made for any difference in its value, not due to such lapse of time, as of the date one year after the date of decedent's death, or as of the date of its distribution, sale, exchange, or other disposition, whichever date first occurs.

* * *

"The property to be valued as of one year after the date of decedent's death, or as of date of decedent's death, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. As property and its value are separate and distinct, the former denoting legal rights, the latter the monetary measure of such rights, and as subdivision (j)

treats of the two separately, it will be necessary in every case first to determine what property constituted the gross estate at decedent's death. Subdivisions of section 302, as amended, other than subdivision (j) supply the information necessary to that determination, subdivision (j) being, in the main, confined to the date or dates as to which the value is to be ascertained.

"Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay interest, and both promises are a part of the gross estate at the death of the decedent * * *. If the valuation date is that of decedent's death, the principal of the obligation and interest then accrued and unpaid thereon are to be valued as of that date. If the valuation date is subsequent to death, the principal and interest then accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. * * *

* * *

"When corporate stock is a part of the gross estate at decedent's death, and a dividend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether the earnings are made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value of the

stock. But a dividend declared prior to the valuation date of the stock and payable subsequent thereto will not be so reflected if the stock is selling 'ex dividend' on such valuation date, but is to be valued as of that date.

"Differing from payments of principal and interest in the case of bonds and notes, those made upon a judgment are not pursuant to a promise but to an obligation imposed by law, which obligation, in its totality, is a part of the gross estate at decedent's death if coming within any of the other subdivisions of section 302, as amended. So, too, liquidating dividends and dividends paid from earnings are not pursuant to a promise but are referable to legal rights inherent in stock ownership. * * *

* * *

"The election is available to the executor only at the time the return is filed, and only if the return is filed within fifteen months from the decedent's death, or within the period of an extension of time for filing * * *. The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property. The election, if exercised, cannot be rescinded."

APPENDIX B.

Conference Report of the Senate and House Committees—No. House Report 1885.

"The amendment also allows an additional deduction in computing the value of net estate, of the net shrinkage in value of assets arising from the difference in the aggregate value of assets forming part of the decedent's gross estate on the date of death and the aggregate value of such assets one year thereafter, substituting the date of sale or exchange by the executor in the case of assets sold or exchanged during such one year period. In lieu of this provision, the conference action inserts a provision giving the executor an election with respect to the time as of which the property included in the gross estate is to be valued. Under existing law the valuation is made as of the date of death. If the executor exercises the election given him by the conference agreement, all the property included in the estate on the date of death, is to be valued as of the date one year after the decedent's death, except that the value (at the time of distribution, sale, exchange or other distribution) of property distributed, sold, exchanged, or otherwise disposed of, is taken in lieu of its value as of one year after death. Unless the decedent owns an interest or estate, the value of which is affected by mere lapse of time, the value used under the election is the value as of date of death adjusted for change in value not due merely to lapse of time. Deductions for loss from fire, other casualty, etc., and other deductions are disallowed if reflected in the latter valuation of the property. * * * The operation of the new provision giving the executor the election may be shown by the following example:

"A decedent dies owning real estate of the value of $100,000; corporate stock of the value of $60,000;

bonds of the value of $20,000; foreign government bonds maturing nine months after date of death of a face value of $10,000 but of a value of $9,550; and cash amounting to $5,000. These are values as of date of death. The gross estate at date of death amounts therefore to $194,550. The decedent had debts of $15,000 and the administration expenses were $25,000, which debts and expenses were promptly paid by the executor. The value of the net estate as of the date of death was, therefore (after taking off the specific exemption), $114,550. Six months after the decedent's death the executor distributed the bonds to legatees under the will, at which time they were worth $18,000, and he sold all the corporate stock owned by the decedent for a fair market value of $50,000 in order to raise cash to pay the debts and expenses. The foreign bonds were paid in full at maturity. During the first year after the decedent's death the value of his real estate depreciated $5,000. The executor elects to take advantage of the new provision of the bill. The value will be arrived at in the following way:

ASSETS

Real estate (as of one year after death)		$105,000.00
Corporate stock (as of date of sale)		50,000.00
Bonds (as of date of distribution)		18,000.00
Foreign Bonds (as of date of maturity)		10,000.00
Cash		5,000.00
Gross estate		$188,000.00

DEDUCTIONS

Debts	$15,000.00	
Administration expenses	25,000.00	
Specific exemption	40,000.00	80,000.00
Net estate		$108,000.00"